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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER FARRIS et al., Defendants and Appellants.	C080341 (Super. Ct. No. 14F02926)

On April 3, 2014, defendants Christopher Farris and Paul Wesley Kahana robbed Kings Smoke Shop in Sacramento, taking cartons of cigarettes, cigars, other tobacco related merchandise, and money. A jury found both defendants guilty of second degree robbery (Pen. Code, § 211),[1] but found the firearm enhancements (§§ 12022.53, subd. (b); 12022, subd. (a) (1)) not true. The trial court sentenced each defendant to three years

[1] Further undesignated statutory references are to the Penal Code.

in prison. On appeal, Farris contends there was insufficient evidence to sustain his conviction, because the victim's identification of him by voice was not credible. Both defendants contend the trial court erred in dismissing the only African-American juror mid-trial and in denying a motion for a new trial that was based on a claim of *Brady* error.[2] We find no prejudicial error and affirm.

FACTS

The Robbery

Varinger Singh worked at the family business, Kings Smoke Shop. On the night of April 3, 2014, he saw someone digging through the garbage can outside. A man, later identified as Kahana, walked inside and pulled a gun. Another man, later identified as Farris, ran in from the other side and grabbed cigars, cigarettes, and other merchandise and put it in a garbage bag. Kahana ordered Singh to open the cash register, and Singh complied. After the robbers left, Singh called 911. The robbers took about $200 in cash, 20 to 30 cartons of cigarettes, Swishers, different types of cigars, blunt wraps, and rolling papers. The robbery was captured on surveillance video.

Kahana wore a hoodie and a mask. At one point, Kahana adjusted his mask and Singh got a partial look at Kahana's face. Singh recognized Kahana as a regular customer who came in once or twice a week to buy blunt wraps and Newport cigarettes. Kahana also always dug through the trash for recyclables. Kahana often came in with a friend who wore a Green Bay Packers jersey.

Singh did not see Farris's face, but recognized him by his voice which Singh described at various times as "squeezy," "different," and "unique." Farris was also a customer; he bought Swishers at the shop.

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[2] *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215].

A patrol sergeant drove to a nearby apartment complex, in the direction the robbers fled. He looked over the fence and saw numerous cartons of cigarettes, little cigar packages, and currency. These items were returned to Singh.

The Investigation

Detective Mike French met with Singh a few days after the robbery to attempt to identify the robbers as Singh did not know their names. From surveillance video (taken inside the store but not during the robbery), Singh pointed out the man in the Green Bay Packers jersey who he knew as a friend of the first robber (Kahana). French identified Dominick Green as the Packers fan. Green told French he went to the smoke shop with "Chris" and "Orlando." In a later conversation, Green mentioned Kahana.

French identified Orlando as Orlando Walker and questioned him while Walker was in custody on an unrelated felony. Walker told French he had bought cartons of cigarettes from Kahana in early April for a very low price; it could have been the second or third of the month. During the sale Kahana did the talking, but Farris was also there. At trial, Walker could not recall dates or much of what he told French. He did not remember telling French that Farris had a unique voice, but agreed he had said the voice was "hellafied" (or exaggerated). Walker claimed in trial he had a brain tumor that made it difficult for him to remember. Walker could not understand how he could be considered a suspect because due to the brain tumor he "couldn't run away from a 2-year-old girl."

French did consider Walker a potential suspect. He showed Singh three photographic lineups: one with Kahana; one with Farris; and one with Walker. Singh identified Kahana and Farris as the robbers. Singh made no identification from the lineup containing Walker.

The police arrested Kahana near the smoke shop in his 1993 Cadillac. Various tobacco products were found in the car. There were also several large trash bags, similar to those used in the robbery. No gun was recovered.

Kahana had a contact number for Farris in his phone. After Farris was arrested, the police removed the SIM card from his phone and reviewed the call history. From March 28 to April 6, 2014, there were 18 calls and one text message between Farris and Kahana.

The Defense

The defense focused on misidentification and whether the gun used in the robbery was real. A defense investigator produced photographs of real and replica guns. He testified both types of guns can look real. (The jury found the firearm enhancements not true as to each defendant.)

Geoffrey Loftus, a psychology professor, testified about the limits of memory in making an accurate identification and the reasons memory might be inaccurate. He also testified about biased identification procedures.

New Trial Motion

Both Farris and Kahana moved for a new trial on the basis of a *Brady* violation. They argued the People had failed to disclose evidence that went to the credibility of a primary witness, Orlando Walker. At trial, Walker had testified he had a brain tumor when discussing his poor memory and physical conditioning. Discovery in a 2013 assault case prosecuted by the same District Attorney's office, in which Walker was the victim, showed that Walker's claim to have a brain tumor was not true. Walker's medical records had been subpoenaed. A CT scan of Walker's head performed in June 2013 revealed "no acute intercranial pathology." This discovery material showed that Walker had complained of seizures and had been prescribed medication for seizures (Keppra). The defense argued this new evidence would have "devastated the credibility" of Walker by showing that he was a "liar."

The trial court denied the new trial motion. It found that if the jury had known that in 2013 Walker was found *not* to have a brain tumor, there was no reasonable probability of a different outcome.

DISCUSSION

I

Sufficiency of the Evidence as to Farris

Farris contends the evidence is insufficient to convict him of robbery. He argues he was not found in possession of stolen property and Singh did not see and could not describe his face. Farris contends Singh's identification of him by his voice was not credible. He argues Singh did not tell the first officer who responded to the robbery that the second robber had a unique voice and Detective French, who questioned Farris at length, did not find his voice unique. But this argument goes to credibility, not sufficiency, as we explain. And credibility determinations are properly left to the jury.

"In reviewing the sufficiency of the evidence to support a judgment of conviction, we examine the entire record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Hayes* (1990) 52 Cal.3d 577, 631.)

"Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) "It is established that the strength or weakness of an identification are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration of the jury." (*People v. Avina* (1968) 264 Cal.App.2d 143, 147.) " 'Apropos the question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all.' [Citations.]" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 521.)

"Our courts have held that it is not necessary that any of the witnesses called to identify the accused should have seen his face. [Citation.] Identification based on other peculiarities may be reasonably sure. Consequently, the identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing. [Citations.]" (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 494.) " 'It is universally recognized that the voice as well as the physical appearance of a person, is a means by which identification is made possible, there being no more similarity in the voices of different people than there is in their physical appearance. . . . Therefore testimony relating to the identity of the voice is competent, its probative value being a question of fact for the jury.' [Citation.]" (*People v. Mullins* (1956) 145 Cal.App.2d 667, 670.)

Here, Singh positively identified Farris as the second robber based on his voice, which Singh found distinctive, coupled with his familiarity with Farris as a customer. Any weakness in his identification of Farris was for the jury's evaluation. (*People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372-1373.) Since the jury accepted the identification, and the identification by voice was neither impossible nor inherently improbable, substantial evidence supports the verdict. (*People v. Scott* (1978) 21 Cal.3d 284, 296 ["The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable"].) Further, evidence of Farris's association with Kahana and his familiarity with Kings Smoke Shop, although certainly not dispositive, corroborated Singh's identification of Farris as one of the two robbers.

II

Dismissal of Juror No. 9

A. *Background*

During trial, Juror No. 9 saw potential witness Dominick Green in the hallway, realized she knew him, and informed the court.[3] Juror No. 9 told the court she knew Green from volunteer work she had done; he lived in the neighborhood where she went door to door. She had not seen him in five years. She had contact with him about 12 times during which she spoke with him briefly about the Bible and left literature for his mother. She found him very cordial, very nice, and welcoming.

Defendants found no reason to excuse Juror No. 9. The prosecutor argued the juror had formed an opinion about Green pretrial, and the court agreed. The trial court declared it was prepared to excuse her unless all counsel stipulated that she could remain. Defendants objected to her release. The prosecutor was not willing to stipulate that she could remain. The court dismissed Juror No. 9.

Defendants put their objections on the record. First, Juror No. 9 was the only African-American juror. Both defendants were African-American. Second, after Juror No. 9 was replaced by an alternate, there were no alternate jurors left. The prosecutor responded that Juror No. 9 was replaced for cause. He argued: "The fact that she has a prior opinion about a witness makes it difficult for her to -- or impossible for her to be able to judge the case objectively." However, as we discuss further below, the juror was never *asked* whether she could judge the case objectively.

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[3] Green had been named as a witness, but was not ultimately called to testify. The record does not include jury selection, and the parties do not reference the juror's response to questions regarding her knowledge of the potential witnesses which may have come pretrial.

B. *The Law*

The trial court may discharge a juror for good cause at any time if the court finds that the juror is unable to perform his or her duty. (Pen. Code, § 1089; *People v. Lomax* (2010) 49 Cal.4th 530, 588.) "A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge." (*People v. Nesler* (1997) 16 Cal.4th 561, 581.) Actual bias requires "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).)

"Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion [citation], we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror's inability to perform as a juror must be shown as a 'demonstrable reality' [citation], which requires a 'stronger evidentiary showing than mere substantial evidence' [citation]." (*People v. Wilson* (2008) 44 Cal.4th 758, 821.) "The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053.)

When, during trial, the trial court discovers material information tending to show bias of a juror, "the trial court may discharge the juror if, after examination of the juror, the record discloses reasonable grounds for inferring bias as a 'demonstrable reality.' "

(*People v. Price* (1991) 1 Cal.4th 324, 400.) An inquiry "sufficient to determine the facts" is required. (*People v. Burgener* (1986) 41 Cal.3d 505, 519, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

That a juror may have been a victim of a crime or may know a party, a witness, or the judge does not necessarily render the juror biased. "It is not necessary that jurors be totally ignorant of the facts and issues involved in the case; it is sufficient if they can lay aside their impressions and opinions and render a verdict based on the evidence presented in court." (*People v. Fauber* (1992) 2 Cal.4th 792, 819.)

C. *Analysis*

Kahana contends that by dismissing Juror No. 9 after the People refused to stipulate, the trial court in effect gave the People a mid-trial peremptory challenge. Kahana reasons that since the court offered to keep Juror No. 9 if the parties so stipulated, the court impliedly found Juror No. 9 was able to perform her duty as a juror. Thus, dismissing Juror No. 9 was by peremptory challenge, not for cause.

We do not agree that the dismissal was the equivalent of a peremptory challenge; rather, the record reflects a dismissal for cause. Although the dismissal was in error, as we will explain, the record shows that the trial court dismissed Juror No. 9 because it believed she had a disqualifying opinion of witness Green that prevented her from being impartial. The trial court's offer to retain her by stipulation, although problematic for other reasons, did not change the nature of the dismissal.[4]

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[4] A court should not retain a biased juror by stipulation. (See *People v. Singh* (1932) 121 Cal.App. 107, 111 [court is not required to accept the parties' stipulation on issues of law].) Here there was no stipulation, so we need not address it further. Instead, we review whether the record establishes Juror No. 9's bias as a demonstrable reality.

Farris contends the court's minimal questioning of Juror No. 9 did not establish her bias as a demonstrable reality, as required to dismiss her for cause. The court's questioning revealed only that Juror No. 9 had several contacts with Green five years earlier and in her brief encounters with him she found Green cordial, nice, and welcoming; in short, she found Green polite. The People argue the inquiry was sufficient to establish bias. The People assert that if Juror No. 9 had acknowledged her prior contacts with Green during voir dire, "there is no question that she would have been excluded at that time," presumably for cause. We disagree.

Mere knowledge of a witness is insufficient to establish a juror's bias as a matter of law. The People rely on *People v. Heckler* (1990) 219 Cal.App.3d 1238, disapproved on another point in *People v. Soto* (2011) Cal.4th 229, 248, footnote 12. There, a juror was excused not simply because defendant had joined her church, but because she was bothered and uncomfortable, declaring she could not be sure she could be fair. (*Id.* at pp. 1242-1243.) In *People v. Goins* (1981) 118 Cal.App.3d 923, 926, disapproved on another point in *People v. Ortega* (1998) 19 Cal.4th 686, 695, the excused juror knew a defense witness and "stated that he was so favorably disposed toward this person that he could not be impartial in weighing his testimony." In contrast, there was no error in retaining a juror who knew and thought highly of a witness where the juror affirmed his ability to be fair. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1174-1175; see also *People v. Maciel* (2013) 57 Cal.4th 482, 543-544 [no error not to discharge juror who worked with two witnesses where juror stated he did not really know them, had not socialized with them or spoken with them about case, and would weigh their testimony the same as other witnesses]; *People v. Cochran* (1998) 62 Cal.App.4th 826, 831 [no error not to excuse jurors who knew members of victim's family].)

Here, the trial court never asked Juror No. 9 whether her prior contacts with Green and his mother or her opinion of him would affect in any way her ability to be impartial in evaluating his testimony. There is no evidence that this juror could not be fair.

Although in *People v. Farris* (1977) 66 Cal.App.3d 376, the court upheld dismissal of a juror despite his insistence that he could be fair, that case is distinguishable from the situation at hand. There, the juror had intentionally concealed his current and past criminal charges and evinced negative attitudes toward the police, believing his current charges were illegitimate and a search of his house unreasonable. (*Id.* at pp. 385-386.) Here, the record contains no indication that Juror No. 9 intentionally concealed her knowledge of Green or any other facts showing potential bias. Because she voluntarily brought her familiarity with Green to the court's attention, we infer she did not even realize she knew Green until she saw him at court. Juror No. 9's remote knowledge of Green (from five years earlier) and her opinion that he was polite are fairly neutral facts which would not necessarily affect her evaluation of his credibility. Without any evidence of the effect of her prior contacts with Green on her ability to be impartial, the record does not establish Juror No. 9's bias as a demonstrable reality. The trial court abused its discretion in dismissing Juror No. 9.

D. *Prejudice*

Kahana contends the improper dismissal of a juror is structural error and reversible per se. He analogizes the situation to *Wheeler* error (*People v. Wheeler* (1978) 22 Cal.3d 258) because in both situations it is impossible to determine the effect on the trial of an absent juror. We find the analogy inapt. *Wheeler* error infringes on the constitutional right to a fair and impartial jury by denying a jury drawn from a representative cross-section of the community where prospective jurors are excused based on an impermissible group bias. (See *ibid.*) *Wheeler* error "puts the judicial system in the untoward place of countenancing invidious discrimination." (*People v. Singh* (2015) 234 Cal.App.4th 1319, 1331.) No such considerations are present where a juror is erroneously excused mid-trial for cause and there is no evidence the excusal was based on group bias.

"The right to a fair trial by an impartial jury is one of the fundamental constitutional rights of a criminal defendant. [Citations.] However, a defendant's right to a fair and impartial jury does not entitle him to a jury composed of any particular individuals. [Citations.] '[W]here an alternate juror, approved by defendant in voir dire, is allowed to deliberate on the jury panel, the defendant bears a heavy burden to demonstrate that he was somehow harmed thereby.' [Citation.] This is so because alternate jurors are selected at the same time, are subject to the same qualifications and take the same oath as regular jurors. They hear the same evidence and are bound by the same rules and instructions as the regular jurors, and until the verdict is rendered they are at all times available and qualified to participate as regular jurors. [Citations.]" (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1486.)

A defendant shows harm where a "qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other" is improperly discharged. (*People v. Hamilton* (1963) 60 Cal.2d 105, 128, disapproved on another point by *People v. Daniels* (1991) 52 Cal.3d 815, 865-866.) In *Hamilton*, a capital case, a juror was improperly dismissed after asking a question that indicated she was considering a life sentence. "To dismiss her without proper, or any, cause was tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant." (*Ibid.* at p. 128; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 486 [prejudice established where holdout juror improperly dismissed]; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [prejudice shown where jury deliberated for three days with two or possibly three holdouts, after two jurors improperly dismissed, jury reached a verdict in three hours].)

Here, unlike in the cases above, the jury had not yet begun its deliberations and there was no evidence as to which way the jury or any of its members were leaning. Farris contends the exclusion of Juror No. 9 was prejudicial because she was the only African-American juror. He argues: "Her presence on the jury and *probable* insight into

issues discussed by Dr. Loftus regarding issues in cross-racial identification *may well have been* very helpful to the defendants." (Italics added.) As our addition of italics shows, this argument is entirely speculative. Such speculation does not establish prejudice. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1254 [speculation insufficient to establish prejudice under either *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) The error in dismissing Juror No. 9 was harmless.

III

New Trial Motion

Defendants contend the trial court erred in denying their motion for a new trial based on *Brady* error. They assert the undisclosed evidence that Walker did not actually have a brain tumor, as he claimed at trial, was powerful evidence to impeach the credibility of a key witness and show him to be a liar or at least to have a tenuous grasp on reality.

"In *Brady*, the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] The high court has extended the prosecutor's duty to encompass the disclosure of material evidence, even if the defense made no request concerning the evidence. [Citation.] The duty encompasses impeachment evidence as well as exculpatory evidence." (*People v. Hoyos* (2007) 41 Cal.4th 872, 917 (*Hoyos*).) " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*).)

Evidence is material under *Brady* " 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Hoyos, supra,* 41 Cal.4th at pp. 917-918.) A "defendant has the burden of showing materiality." (*Ibid*.) " 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" (*Id*. at p. 922.)

A motion for a new trial may be based on an asserted *Brady* violation. (*Hoyos, supra,* 41 Cal.4th at p. 917.) We review de novo whether defendants have established the elements of a *Brady* violation. (*Salazar, supra,* 35 Cal.4th at p. 1042.)

The trial court found the fundamental issue was materiality. We, too, will focus on that issue.

Defendants contend the undisclosed impeachment evidence was material because it would have undermined the credibility of a key prosecution witness. Walker testified he purchased cigarettes from Kahana and Farris at below market cost around the time of the robbery. He also told Detective French that Farris had a unique voice. Both of these points corroborated Singh's testimony and identification of Kahana and Farris as the robbers. Defendants contend such corroboration was necessary due to problems and inconsistencies in Singh's testimony. They argue the jury rejected Singh's testimony in part by finding the firearm enhancements not true.

" 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case, [citations].' In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony" [citations].' [Citation.]" (*Salazar, supra*, 35 Cal.4th at p. 1050.)

The undisclosed impeachment evidence does not meet this standard of materiality as Walker provided only corroborating testimony. He did not provide "the only evidence linking the defendant(s) to the crime." (*Salazar, supra*, 35 Cal.4th at p. 1050.) Singh provided the essential evidence of the robbery and identified defendants as the robbers. Walker provided only a few corroborating details. And whether or not he had a brain tumor, he remained a poor witness due to his memory lapses on the stand.

Further, impeachment of Walker would not "have undermined a critical element of the prosecution's case." (*Salazar*, *supra*, 35 Cal.4th at p. 1050.) Having observed Walker testify, the trial court indicated Walker already appeared not credible and doubted whether the evidence refuting his claim of a brain tumor would have changed the jury's perception of him. The prosecutor agreed, calling Walker "a very poor witness for the People." The record suggests the defense agreed with this assessment. There is no indication that confronting Walker with a 2013 test clearing him of a brain tumor would have impacted his credibility to the degree that would undermine the prosecution's case. Both defendants stressed in closing argument that Walker, who was a suspect, had ample motive to point the finger at someone else to shift the suspicion from himself. Whether Walker's claimed inability to remember details of the events he was asked about was due to a brain tumor or due to something else, the fact remains that the information he did manage to provide was not key to the People's case.

Defendants have failed to establish the materiality of the undisclosed evidence. There is not a " 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*Hoyos, supra*, 41 Cal.4th at pp. 917-918.)

DISPOSITION

The judgments are affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Hull, J.